Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah

MAHKAMAH PERSEKUTUAN (PUTRAJAYA) — RAYUAN SIVIL NO W–01–11 OF 2004

AHMAD FAIRUZ KETUA HAKIM NEGARA, PS GILL HMP DAN AUGUSTINE PAUL HMR

14 JUNE 2004

Undang-Undang Tanah — Pemaju perumahan — Remedi pembeli — Tuntutan melalui Tribunal Tuntutan Pembeli Rumah — Bidang kuasa Tribunal Perumahan — Sama ada tribunal mempunyai bidang kuasa untuk mendengar tuntutan berkaitan perjanjian jual beli yang dimasuki sebelum 1 Disember 2002 — Sama ada kesan menguatkuasakan undang-undang pindaan secara kebelakangan melanggar perkara 7(1) Perlembagaan Persekutuan — Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 s 16N(2)

Tribunal Tuntutan Pembeli Rumah ('Tribunal') telah ditubuhkan melalui Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ('Akta Pindaan') yang berkuat kuasa pada 1 Disember 2002. Pada 27 Mac 2003, Tribunal telah membuat penghakiman bahawa perayu dikehendaki membayar kepada Tan Geok Moi sebanyak RM13,926.74. Melalui prosiding semakan kehakiman, Mahkamah Tinggi memutuskan bahawa Tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan-tuntutan itu kerana perjanjian jual beli dimasuki sebelum 1 Disember 2002 dan memberikan perintah-perintah seperti yang dipohon. Persoalan di hadapan mahkamah ini ialah sama ada Tribunal mempunyai bidang kuasa mendengar tuntutan yang timbul daripada perjanjian jual beli yang dimasuki sebelum tarikh Akta Pindaan berkuat kuasa.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa mengikut s 16N(2) Akta Pindaan, asalkan tuntutan di hadapan Tribunal itu melibatkan perjanjian jual beli di antara pembeli rumah dan pemaju perumahan berlesen dan tuntutan dibuat dalam masa tidak melebihi 12 bulan daripada tarikh pengeluaran sijil penghunian atau tarikh luput tempoh liabiliti kecacatan seperti dinyatakan di dalam perjanjian jual beli, maka Tribunal mempunyai bidang kuasa untuk mendengar tuntutan tersebut tanpa mengira tarikh perjanjian. Tafsiran ini, diperkuatkan oleh s 16N(3) yang memperuntukkan bahawa sesuatu tuntutan tidak akan dijejaskan atau digagalkan atas alasan tiada perjanjian jual beli wujud di antara pembeli rumah dan pemaju perumahan berlesen pada masa kausa tindakan terakru jika terdapat suatu urusan terdahulu antara pihak-pihak itu mengenai pemerolehan penghunian rumah. Justeru itu, tarikh perjanjian bukanlah perkara yang material bagi membolehkan Tribunal mendengar tuntutan pembeli rumah itu (lihat perenggan 28). Dari suatu sudut yang lain, wajar diingat bahawa Akta Pindaan

memperuntukkan perubahan forum daripada mahkamah kepada Tribunal. Ketara ini adalah perkara berkaitan prosedur dan bukannya substantif. Oleh yang demikian, ianya adalah berkuat kuasa kebelakangan (lihat perenggan 29).

(2) Hujahan pihak perayu bahawa hak-hak substantifnya adalah terjejas dan perkara 7(1) Perlembagaan Persekutuan dicabuli adalah tidak berasas (lihat perenggan 31). Seksyen 16AD memperuntukkan liabiliti baru ke atas pemaju dan pembeli rumah jika mereka gagal mematuhi award Tribunal. Tetapi liabiliti ini adalah berkuat kuasa secara prospektif. Justeru itu, seksyen itu tidak melanggar perkara 7 Perlembagaan Persekutuan. Walau bagaimanapun, kemungkiran perjanjian bukanlah suatu kesalahan jenayah di bawah seksyen itu. Yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award Tribunal dan ianya tidak dalam apa-apa keadaan pun boleh berkuat kuasa kebelakangan kerana Tribunal hanya dapat memberi award selepas 1 Disember 2002. Maka, s 16AD adalah tidak relevan kepada bidang kuasa Tribunal (lihat perenggan 33).

The Tribunal Tuntutan Pembeli Rumah ('the Tribunal') came into existence with the passing of the Housing Developers (Control and Licensing) (Amendment) Act 2002 ('the Amending Act') and began to function on 1 December 2002. On 27 March 2003, the Tribunal delivered a judgment that the appellant must pay Tan Geok Moi a sum of RM13,926.74. The High Court in an application for judicial review, held that the Tribunal had no jurisdiction to hear such claims because the sale and purchase agreement was entered into before 1 December 2002 and give such orders as prayed for. The issue before the court was whether the Tribunal had the jurisdiction to hear claims that arose from the sale and purchase agreements entered into before the date of the Amending Act came into force.

Held, dismissing the appeal:

(1) The Federal Court agreed with the Court of Appeal that following s 16N(2) of the Amending Act and so long as claims before the Tribunal involves sale and purchase agreements between housebuyers and licensed developers and the claim brought does not exceed 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the SPA, the Tribunal, therefore, has the jurisdiction to hear the claims without considering the agreement date. This interpretation is strengthened by s 16N(3) which provides that such claims will not be affected or cancelled based on the reason that there exists no sale and purchase agreements between housebuyers and licensed developers at the time the cause of action accrued, if there exists one previous dealing between the parties as regards the acquisition of the housing accommodation. Moreover, the agreement date is not material to enable the Tribunal to hear the said housebuyer's claim (see para 28). From a different point, it is proper to keep in mind that the Amending Act provides for the

change in forum from the court to the Tribunal. It is obvious that the amendment pertains to procedure and not substance. Therefore, it is retrospective (see para 29).

(2) The appellant's submission that his substantive rights had been affected and art 7(1) of the Federal Constitution infringed is baseless (see para 31). Section 16AD imposed a new liability on the housing developer and the housebuyer if they fail to comply with the Tribunal award. However, this liability came into force prospectively. Moreover, that section does not breach art 7 of the Federal Constitution. A breach of the said agreement is not a criminal offence under that section.What makes a criminal offence is the non-compliance with the Tribunal award and it cannot in any situation be retrospective because the Tribunal can only give an award after 1 December 2002. Therefore, s 16AD had no relevance to the jurisdiction of the Tribunal (see para 33).]

Nota-nota

Untuk kes mengenai remedi pembeli, lihat 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) perenggan 2623.

Kes-kes yang dirujuk

Chebaro v Chebaro [1986] 2 All ER 897 (dirujuk)
Energoprojek (M) Holdings v PP [1998] 5 MLJ 401 (dirujuk)
Hager v Osborne [1992] Fam 94 (dirujuk)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (dirujuk)
New India Insurance Co Ltd v Shanti Misra AIR 1976 SC 237 (dirujuk)
Ramzan Darzi & Ors v Mat Azizi & Ors [1976] CLJ 897 (dirujuk)
Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd (dirujuk)
VCK Bus Service v HB Sethna AIR 1965 Mad 149 (dirujuk)
Affiliation Proceedings Act 1957 s 2
Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ss 16AD, 16N(2), 32(2)
Guardianship of Minors Act 1971 s 11B [Eng]
Matrimonial and Family Proceedings Act 1984 s 12 [Eng]
Perlembagaan Persekutuan perkara 7(1)

Rayuan daripada: Rayuan Sivil No W–01–55 tahun 2003 (Mahkamah Rayuan, Kuala Lumpur) dan Permohonan untuk Semakan Kehakiman No R1–25–58 tahun 2003 (Mahkamah Tinggi, Kuala Lumpur)

Lambert Rasa-Ratnam (Sean HM Yeow bersama beliau) (Lee Hishammuddin) untuk perayu.
Abdul Gani Patail (Azahar Mohamed, Umi Kalsom Abd Majid, Mastura Ayob dan Norina Bahadon bersama beliau) (Jabatan Peguam Negara) untuk responden.

Ahmad Fairuz Ketua Hakim Negara (menyampaikan penghakiman mahkamah):

[1] Pada 14 Jun 2004, mahkamah ini telah mendengar rayuan perayu di atas soalan berikut:

whether the Tribunal has jurisdiction to hear and adjudicate on cases where the sale and purchase agreement was entered into before 1 December 2002 and, if so to what extent.

Di akhir pendengaran rayuan, mahkamah ini telah menolak rayuan perayu dan berikut adalah alasan-alasan bagi keputusan tersebut.

[2] Tribunal Tuntutan Pembeli Rumah ('Tribunal') telah ditubuhkan melalui Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ('Akta Pindaan') yang berkuat kuasa pada 1 Disember 2002. Tujuan penubuhan ini adalah untuk membolehkan Tribunal mendengar tuntutan oleh pembeli rumah terhadap pemaju perumahan. Sebelum Akta Pindaan ini berkuat kuasa, seseorang pembeli rumah boleh menuntut ganti rugi terhadap pemaju perumahan melalui tindakan di mahkamah sivil.

[3] Pada 27 Mac 2003, Tribunal di dalam Tuntutan No TTPR/B/0057/03 telah membuat penghakiman bahawa perayu dikehendaki membayar kepada Tan Geok Moi sebanyak RM13,926.74. Pada 5 Mei 2003, Mahkamah Tinggi Kuala Lumpur telah memberi kebenaran kepada perayu untuk memulakan prosiding semakan kehakiman (judicial review) untuk suatu perintah certiorari bagi membatalkan penghakiman itu dan untuk suatu pengisytiharan bahawa Tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan di mana perjanjian jual beli dimasuki sebelum 1 Disember 2002. Pada 4 September 2003, Mahkamah Tinggi memutuskan bahawa Tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan-tuntutan itu dan memberikan perintah-perintah seperti yang dipohon. Jika Parlimen, mengikut mahkamah itu, berhasrat memberikan Tribunal bidang kuasa kebelakangan untuk meliputi perjanjian jual beli yang dimasuki sebelum berkuat kuasanya Akta Pindaan tersebut, maka Parlimen akan mengatakan sedemikian dengan perkataan-perkataan yang jelas sepertimana dinyatakan di dalam s 32(2) Akta Pindaan yang berbunyi 'Every agreement, assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to, and the parties thereto shall be entitled to the benefits of, the new s 22C of the principal Act'. Yang Arif Hakim Mahkamah Tinggi selanjutnya menekankan bahawa di bawah s 16AD hanya ketidakpatuhan kepada sesuatu award Tribunal dan bukannya kemungkiran syarat perjanjian itu sendiri yang akan membawa kepada liabiliti jenayah. Sungguhpun demikian award tersebut adalah, mengikut YA, berlanjutan daripada kemungkiran perjanjian jual beli. Oleh kerana kemungkiran-kemungkiran dalam permohonan-permohonan di hadapannya berlaku sebelum penubuhan Tribunal, dan oleh kerana Parlimen tidak memperuntukkan dengan nyata bahawa pindaan-pindaan itu mempunyai kesan kebelakangan, maka YA berpendapat bahawa Tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan-tuntutan yang terbit daripada perjanjian jual beli yang dimasuki sebelum 1 Disember 2002.

[4] Terhadap keputusan Mahkamah Tinggi itu, Tribunal merayu kepada Mahkamah Rayuan. YA Richard Malanjum HMR di dalam penghakimannya berkata:

Applying the liberal and purposive approach to the statutory provisions that deal with the jurisdiction of the Tribunal we find that the argument advanced for the respondents is

premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated.

With respect, we find the first assumption to be without basis. There is nothing in the provisions establishing the Tribunal or related thereto which can be said to support it. In our view while s 16M sets out the general jurisdiction of the Tribunal, it is s 16N and in particular sub s 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal.

[5] Mengenai s 16N(2) itu, YA Hakim Mahkamah Rayuan juga berkata:

Subsection 16N(2) does not stipulate a cut off point by reference to date of agreement vis-a-vis jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of sub s 16N (2) that is to say:

(a) whether the claim is based 'on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer'; and

(b) whether the claim is 'brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement'.

We do not think there should be any additional or prerequisite term to be read into the provisions. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators.

[6] YA HMR itu seterusnya berkata:

In fact the need for a sale and purchase agreement as a condition precedent in filing a claim has also been waived by sub s 16N(3) …

[7] Mengenai s 16AD, YA Hakim Mahkamah Rayuan itu memutuskan:

We are conscious of the counter-argument that without a breach in the first place there is no question of an award being given by the Tribunal and without an award there is no issue of penalty arising. And if a breach occurred before the appointed date that would effectively be criminalising an act retrospectively.

With respect, a distinction should be drawn between a breach of the sale and purchase agreement and an award rendered arising from such breach. As we have stated earlier on it is not the breach of the sale and purchase agreement that has been criminalised. Rather it is the failure to comply with or satisfy any award given by the Tribunal in connection with any claim made pursuant to such breach. At any rate s 16AD does not empower the Tribunal to impose any penalty. It only provides for a defaulter to be subject to prosecution which invariably is the task of another authority in a separate criminal proceeding. And on being prosecuted a defaulter is at liberty to raise in defence the inapplicability of the section

to him. Such approach was successful in the case of *Energoprojek (M) Holdings v Public Prosecutor* [1998] 5 MLJ 401. Accordingly, we do not think s 16AD is intended to take away any substantive right of any person. Neither is it meant to affect or limit the jurisdiction of the Tribunal in any manner howsoever.

[8] Berkenaan hujah perayu bahawa jika Tribunal dibenarkan mendengar tuntutan yang berasaskan perjanjian jual beli yang dimasuki sebelum tarikh 1 Disember 2002, ia akan menjejas dan memprejudiskan hak-hak substantif responden, YA HMR itu berkata:

It is to be noted that the establishment of the Tribunal is in effect a creation of another forum intended for speedy disposal at a minimum cost of a prescribed claim up to the limit of RM25,000 by a homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into between the parties. There is therefore no question of the rights of anyone being eroded or removed as was envisaged in *The Colonial Sugar Refining Co v Irving* [1905] AC 369 (PC). See also *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1.

And although it may be argued that the imposition of penalty has a prejudicial effect, such preposition may be true if it is the breach of the sale and purchase agreement that has been criminalised. But here it is not the case.

Lantas, rayuan perayu ditolak oleh Mahkamah Rayuan.

[9] Di mahkamah ini, Encik Lambert Rasa-Ratnam bagi pihak perayu telah juga berhujah bahawa Tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan berkaitan perjanjian jual beli yang dimasuki sebelum 1 Disember 2002. Untuk menyokong hujahnya, Encik Lambert Rasa-Ratnam merujuk kepada ungkapan penghakiman mahkamah ini di dalam kes *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 yang berbunyi:

The presumption against retrospectivity of legislation is based upon the judicial philosophy that Parliament does not intend an unjust result. See Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 at p 31. That this approach is still current appears from two recent decisions of the House of Lords. The first of these is 'The Boucraa' [1994] 1 All ER 20 at pp 29–30 where Lord Mustill said:

> My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation of past conduct which was lawful when it took place, or on alterations to the antecedent natural, civil or familiar status....

[10] Encik Lambert Rasa-Ratnam juga merujuk kepada kes*Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 di mana Mahkamah Rayuan berkata:

In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if

A applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity.

[11] Encik Lambert Rasa-Ratnam menegaskan bahawa pindaan itu bukan hanya B berkaitan dengan forum tetapi melibatkan juga hak-hak substantif perayu di mana dengan kemasukan s 16AD, obligasi perayu di sisi undang-undang telah berubah sifat. Ini kerana s 16AD mengenakan penalti jenayah bagi ketidakpatuhan kepada award yang dibuat oleh Tribunal dan penalti itu tidak dikenakan terhadap perayu sebelum Akta Pindaan itu berkuat kuasa. Encik Lambert Rasa-Ratnam merujuk C kepada *Craies on Statute Law* (6th Ed) di mana di ms 386 penulis mentakrifkan undang-undang kebelakangan seperti berikut:

> which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty; or attaches a new disability in respect to transactions or considerations already past.

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[12] Encik Lambert Rasa-Ratnam berhujah bahawa pihak-pihak, ketika memasuki perjanjian jual beli, tidak menjangkakan kemungkiran perjanjian itu akan mengakibatkan kesalahan jenayah. Jika Tribunal diberi bidang kuasa ke atas E perjanjian sebelum 1 Disember 2002, ini bermakna undang-undang jenayah akan berkuat kuasa kebelakangan sedangkan ini dilarang oleh perkara 7 Perlembagaan Persekutuan. Justeru itu Encik Lambert Rasa-Ratnam berhujah bahawa jika mahkamah ini memutuskan bahawa Tribunal mempunyai bidang kuasa ke atas perjanjian jual beli yang dimasuki sebelum 1 Disember 2002, beliau menggesa mahkamah menghadkan pemakaian s 16AD hanya kepada perjanjian yang dimasuki F selepas tarikh tersebut.

[13] Di dalam hujahan balasnya, Peguam Negara bagi pihak responden merujuk kepada kes *Energoprojek (M) Holdings v Public Prosecutor* [1998] 5 MLJ 401, dan menekankan bahawa mahkamah perlu melihat kepada tujuan sesuatu perundangan G digubal. Tujuan Parlimen menggubal Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ialah untuk melindungi pembeli-pembeli rumah daripada pemaju perumahan. Seksyen 16AD, hujah Peguam Negara, tidak boleh ditafsirkan sebagai mewujudkan suatu kesalahan bagi kemungkiran perjanjian kerana di bawah seksyen itu yang menjadi kesalahan adalah ketidakpatuhan kepada award Tribunal. Kedua-dua perkara itu, mengikut Peguam Negara adalah tidak berhubung kait. Oleh H kerana yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award dan award itu hanya diberi selepas 1 Disember 2002. Seksyen 16AD, tegas Peguam Negara, adalah berkuat kuasa secara prospektif dan oleh demikian tidaklah bercanggah dengan perkara 7 Perlembagaan Persekutuan.

I **[14]** Persoalan di hadapan mahkamah ini ialah sama ada Tribunal mempunyai bidang kuasa mendengar tuntutan yang timbul daripada perjanjian jual beli yang dimasuki sebelum tarikh Akta Pindaan berkuat kuasa. Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa bidang kuasa Tribunal adalah sebagaimana diperuntukkan oleh s 16N(2) yang berbunyi:

The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

[15] Sehubungan ini, mahkamah ini merujuk kepada s 16N(3) dan s 16O(1) Akta Pindaan yang masing-masingnya memperuntukkan bahawa:

16N(1) …

(2) …

(3) Notwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation.'

16O(1)Notwithstanding that the amount or value of the subject-matter claimed or in issue exceeds twenty-five thousand ringgit, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.

[16] Peruntukan-peruntukan di atas menunjukkan bahawa bidang kuasa Tribunal ditetapkan secara longgar. Ini pada pendapat mahkamah, menunjukkan hasrat Parlimen untuk menyediakan suatu forum yang mudah bagi pembeli-pembeli rumah membuat tuntutan. Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa:

It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into prior to the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal.

[17] Di dalam kes *Chebaro v Chebaro* [1986] 2 All ER 897, pihak-pihak telah berkahwin di Beirut, Lebanon dan menetap di United Kingdom. Mereka kemudian berpisah tetapi masih tinggal di England. Pada 16 April 1985, atas permohonan suami, dikri cerai telah diberikan di Lebanon. Selepas s 12 Matrimonial and Family Proceedings Act 1984 berkuatkuasa di England pada 16 September 1985, isteri telah memohon kebenaran untuk suatu perintah untuk relif kewangan. Seksyen 12 Akta itu berbunyi:

Where (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

[18] Sheldon H membenarkan permohonan isteri dan di dalam penghakimannya di ms 903 berkata:

> Apart from his reliance in the present case on the general proposition that legislation is not to be regarded as having retrospective operation unless such a construction is unavoidable, counsel for the husband has pointed to the unfair consequences to the husband that might follow in such an event; the creation of new rights and obligations and by the imposition on him of potentially severe financial liability which did not exist when his marriage was dissolved. The possibility of such disadvantages, of course, I accept; indeed, the risk that such consequences will follow forms the basis of the court's dislike of retrospective legislation. That is not to say, however, that such risks are not contemplated or even intended by Parliament when introducing new legislation.

[19] Di ms 904, YA berkata:

> In my judgment … those words, in their ordinary and natural meaning, apply initially to all cases in which the divorce, annulment or legal separation has been pronounced in judicial or other proceedings overseas, whatever the date of such proceedings and even if it was before 16 September 1985, and accordingly, the provisions in question are retrospective in their effect.

[20] Terhadap keputusan YA Hakim itu, suami merayu kepada Mahkamah Rayuan dan Balcombe LJ di dalam *Chebaro v Chebaro* [1987] Fam 127 berkata di ms 131:

> … in my judgment the meaning of the words used is plain and unequivocal. The use of the past tense — 'Where … a marriage has been dissolved' — in contradistinction to the present tense in the following paragraph — and … the divorce … is entitled to be recognised' — makes it clear that the section is intended to apply to a decree of divorce, whenever pronounced and whether before or after 16 September 1985 … Further support for this construction is afforded by the provisions of paragraphs (a) and (b) of s 15(1) of the Act of 1984. These lay down the jurisdictional requirements which have to be satisfied for the court to entertain an application for financial relief under Part III. They are if:
>
> (a) either of the parties to the marriage was domiciled in England and Wales … on the date on which the divorce, annulment or legal separation obtained in overseas country took effect in that country; or (b) either of the parties was habitually resident in England and Wales throughout the period of one year ending with the date … on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; ….
>
> This is language which it is hard to reconcile with a construction that limits the operation of s 12 only to those overseas divorces granted after the date when Part III came into force.

[21] Neill LJ pula berkata di ms 134:

> In my judgment the intention of the legislature can be determined with sufficient certainty by looking at the words of s 12(1) of the Act of 1984 by themselves. It is plain from the concluding words of the subsection that a person can apply to the court for financial relief if the conditions set out in paragraphs (a) and (b) are satisfied. It is also to be observed that this right can be exercised by either party to the marriage.

[22] Jelas daripada ungkapan-ungkapan penghakiman di atas, mahkamah itu mengambil pendekatan bahawa mengikut maksud dan kesan biasa s 12 itu, soal sama ada sesuatu perkahwinan itu dibubarkan sebelum atau selepas seksyen itu berkuatkuasa tidak penting. Apa yang penting ialah syarat-syarat yang dinyatakan di dalam seksyen itu dipenuhi.

[23] Prinsip yang sama juga dipakai di dalam kes *Hager v Osborne* [1992] Fam 94. Di dalam kes itu, pemohon telah pada 5 Julai 1990 memohon, di bawah s 11B Guardianship of Minors Act 1971 yang berkuat kuasa pada 1 April 1989, peruntukan kewangan bagi anaknya yang dilahirkan pada 23 December 1983. Responden menafikan dirinya ayah kepada anak itu dan memohon membatalkan tuntutan pemohon atas alasan, antara lainnya, bahawa s 11B itu tidak berkuat kuasa kebelakangan. Seksyen 11B itu berbunyi:

> The court may, on the application of either parent of a child, make — (a) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in sub-s (2) of this section; … (2) The orders referred to in sub-s (1) of this section are — (a) an order requiring one parent to make to the other parent for the benefit of the child, or to the child, such periodical payments, and for such term as may be specified in the order; … (c) an order requiring one parent to pay to the other parent for the benefit of the child, or to the child, such lump sum as may be so specified; (d) an order requiring either parent to transfer to the other parent for the benefit of the child, or to the child such property as may be so specified, being property to which the first-mentioned parent is entitled, either in possession or reversion; (e) an order requiring that a settlement of such a property as may be so specified, being property to which either parent is so entitled, be made to the satisfaction of the court for the benefit of the child.

[24] Merujuk kepada penghujahan peguam responden YA Hakim berkata di ms 99:

> Mr Turner … submits, and there is attraction to this submission, that by s 2 of the Affiliation Proceedings Act 1957, three years having elapsed since the child's birth without the respondent having paid money for the child's maintenance, the respondent had acquired the right pursuant to s 2 of the Affiliation Proceedings Act 1957 not to be sued for maintenance thereafter, and accordingly, that accrued right should not be taken away from him retrospectively.

[25] Seksyen 2 Affiliation Proceedings Act 1957 memperuntukkan masa bagi membuat aduan mengenai ' paternity' seperti berikut:

> (a) at any time within three years from the child's birth; or, (b) at any subsequent time, upon proof that the man alleged to be the father of the child has within the three years next after the birth paid money for its maintenance ….

[26] Berhubung peruntukan ini YA Hakim berkata:

> It is common ground that the respondent made no such payment for the boy's maintenance, and consequently the mother would not have been entitled to seek an order for such maintenance after 23 December 1986. That date passed without any further proceedings being launched and the respondent was thus entitled to feel that he was no longer at risk of being required to maintain his child.

A **[27]** Yang Arif Hakim bagaimanapun menolak permohonan responden untuk membatalkan tindakan pemohon dengan menyatakan demikian di ms 101:

> In my judgment, the natural and ordinary meaning of s 11B of the Act 1971, taken in isolation and taken in the context of the other provisions I have referred to, leads inevitably to the conclusion that no rule or presumption against retrospectivity operates so as to
B prevent the claim being made on the facts such as those before me.

[28] Demikian juga dengan rayuan di hadapan mahkamah ini. Berasaskan ungkapan-ungkapan penghakiman di atas, mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa mengikut s 16N(2), asalkan tuntutan di hadapan
C Tribunal itu melibatkan perjanjian jual beli di antara pembeli rumah dan pemaju perumahan berlesen dan tuntutan dibuat dalam masa tidak melebihi 12 bulan daripada tarikh pengeluaran sijil penghunian atau tarikh luput tempoh liabiliti kecacatan seperti dinyatakan di dalam perjanjian jual beli, maka Tribunal mempunyai bidang kuasa untuk mendengar tuntutan tersebut tanpa mengira tarikh
D perjanjian. Tafsiran ini, pada pendapat mahkamah ini, diperkuatkan oleh s 16N(3) yang memperuntukkan bahawa sesuatu tuntutan tidak akan dijejaskan atau digagalkan atas alasan tiada perjanjian jual beli wujud di antara pembeli rumah dan pemaju perumahan berlesen pada masa kausa tindakan akru jika terdapat suatu urusan terdahulu antara pihak-pihak itu mengenai pemerolehan penghunian rumah.
E Justeru pada pendapat mahkamah ini, tarikh perjanjian bukanlah perkara yang material bagi membolehkan Tribunal mendengar tuntutan pembeli rumah itu.

[29] Dari suatu sudut yang lain, wajar diingat bahawa Akta Pindaan memperuntukkan perubahan forum daripada mahkamah kepada Tribunal. Ketara ini adalah perkara berkaitan prosedur dan bukannya substantif. Oleh yang demikian
F ianya adalah berkuat kuasa kebelakangan. Prinsip ini telah ditegaskan di dalam kes-kes *Ramzan Darzi & Ors v Mst Azizi & Ors* [1976] CLJ 897 dan *New India Insurance Co Ltd v Shanti Misra* AIR 1976 SC 237. Di dalam kes *Ramzan Darzi*, Jaswant Singh CJ di dalam penghakiman majoriti berkata di ms 898 dan 899:

G The point that therefore remains for consideration is whether the choice of forum relates to the realm of procedure or not. That the choice of forum is a matter of procedure and is not a matter of substantive right and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned appears to be well settled. Reference in this connection may be made to a decision of the Allahabad High Court in *Hazari Tewari v Mt Maktula* AIR 1932 All 30, where Sulaiman Ag CJ while interpreting the new Tenancy Act
H which conferred jurisdiction on the revenue court and barred the jurisdiction of the civil court in the matter of a suit in respect of which adequate relief could be obtained by way of a revenue suit observed as follows:

> The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned.

I To the same effect is a decision of the Madras High Court in *VCK Bus Service v HB Sethna* AIR 1965 Mad 149 where it was held as follows:

> No litigant has or can have, vested right in a particular forum. He cannot say as a matter of right that his suit or application should be tried by this or that forum which existed on the date his cause of action arose. Forum belongs to the realm of procedure and does

not constitute substantive right of a party or a litigant. It should also be borne in mind that cause of action is not to be confused with a forum, and a cause of action, whatever vested rights it may carry with it, does not include a right to insist upon a particular court or Tribunal or judge or any other. It follows, therefore, that any statutory law which changes a forum, may not raise a question of retrospective operation, unless, of course in exceptional cases, it is inseparably intertwined with vested rights.

[30] Di dalam kes *New India Insurance Co Ltd v Shanti Misra*, Untwalia J menyatakan demikian di ms 240:

On the plain language of s 11OA and 11OF there should be no difficulty in taking the view that the change in law was merely a change of forum ie a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise, the general rule is to make it retrospective. The expressions 'arising out of an accident' occurring in sub-section (1) and 'over the area in which the accident occurred', mentioned in sub-s (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred.

[31] Hujahan pihak perayu bahawa hak-hak substantifnya adalah terjejas dan perkara 7(1) Perlembagaan Persekutuan dicabuli adalah pada pendapat mahkamah ini tidak berasas. Perkara 7 berbunyi:

No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

[32] Seksyen 16AD pula memperuntukkan seperti berikut:

(1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) In the case of a continuing offence, the offender shall, in addition to the penalties under sub-s (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

[33] Mahkamah ini bersetuju bahawa s 16AD memperuntukkan liabiliti baru ke atas pemaju dan pembeli rumah jika mereka gagal mematuhi award Tribunal. Tetapi liabiliti ini adalah berkuat kuasa secara prospektif. Justeru itu, seksyen itu tidak melanggar perkara 7 Perlembagaan Persekutuan. Walau bagaimanapun, kemungkiran perjanjian bukanlah suatu kesalahan jenayah di bawah seksyen itu. Yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award Tribunal dan ianya tidak dalam apa-apa keadaan pun boleh berkuat kuasa kebelakangan kerana Tribunal hanya dapat memberi award selepas 1 Disember 2002. Pada pendapat mahkamah ini s 16AD adalah tidak relevan kepada bidang kuasa Tribunal.

A **[34]** Kami dengan itu telah sebulat suara memutuskan bahawa Tribunal mempunyai bidang kuasa untuk mendengar tuntutan yang timbul daripada perjanjian yang dimasuki sebelum 1 Disember 2002 dan s 16AD adalah juga terpakai kepada perjanjian yang dimasuki sebelum tarikh tersebut. Justeru itu, rayuan perayu telah ditolak.

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Rayuan ditolak.

Reported by Loo Lai Mee

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